
CONTINGENCIES OTHER THAN MORTALITY:

A DEEP DIVE

It is now almost two years since the most recent – 8th – edition of the Ogden Tables was published in July 2020. One of the many changes to the Tables, was an extensive revision of the section concerning Contingencies Other Than Mortality (COTM), the commentary and tables for which now appear at ¶¶54-100 in the Ogden explanatory notes.

1. The purpose of this talk is to:
 - a. First, and most briefly, to describe that revision and compare the old with the new;
 - b. Secondly, to make a deeper examination of the source, derivation and basis for the reduction factors given in the Ogden tables to account for COTM;
 - c. And, third and finally, to set those insights in the wider context of the law of damages for personal injuries.

The revised commentary

Origins

2. We are all familiar, to a greater or lesser extent, with the provisions in the Ogden Tables for COTM.
3. Rudimentary discounting tables were first given in the second edition of the Tables in 1994: these were not broken down by disability status. Instead they provided a “ready reckoner”, where the Claimant’s job was put in a high-, medium-, or low-risk category based on factors affecting job and earnings security, such as job sector, region, etc.
4. These former tables necessarily imputed a very broad exercise, and one aimed at avoiding compensation for a 100% earnings career model. It was based on a piece of research from 1990, entitled “*work time lost to sickness, unemployment and stoppages*”, which indicates its focus: it removes from the account of damages time which the Claimant, but for the accident, would have spent not earning in any event, because of the “bumps in the road” which can happen in any person’s career.

5. The more recent form of COTM tables comes to us from the 6th edition of the Tables, and it is these tables, in revised form, which remain in the Tables in the 8th edition. Significantly, this revision introduced the form of the tables we now know, in which reduction factors (“RFs”) were given according to the following five variables:
 - a. Sex;
 - b. Age at trial (in bands from 16-19 years to 45-49 years, then individual ages from 50 years to 54 years);
 - c. Employment status (employed or not employed);
 - d. Education level (in three ascending categories); and finally,
 - e. Disability status (disabled or not disabled).

6. The most recent edition of the tables contains Tables A-D in the following form:

Table A Loss of earnings to pension age 65: Males – Not disabled

Age at trial	Employed			Non-employed		
	Level 3	Level 2	Level 1	Level 3	Level 2	Level 1
16-19		0.89	0.86		0.87	0.83
20-24	0.91	0.91	0.87	0.88	0.88	0.84
25-29	0.91	0.91	0.88	0.88	0.87	0.83
30-34	0.90	0.90	0.88	0.87	0.86	0.82
35-39	0.88	0.89	0.87	0.85	0.84	0.81
40-44	0.86	0.87	0.86	0.82	0.81	0.79
45-49	0.83	0.85	0.85	0.77	0.77	0.75
50	0.81	0.83	0.84	0.72	0.73	0.71
51	0.80	0.82	0.83	0.69	0.70	0.69
52	0.78	0.81	0.83	0.67	0.67	0.67
53	0.77	0.80	0.82	0.64	0.64	0.64
54	0.76	0.79	0.81	0.60	0.60	0.60

Table B Loss of earnings to pension age 65: Males – Disabled

Age at trial	Employed			Non-employed		
	Level 3	Level 2	Level 1	Level 3	Level 2	Level 1
16-19		0.50	0.29		0.47	0.25
20-24	0.54	0.50	0.34	0.50	0.45	0.24
25-29	0.57	0.50	0.37	0.38	0.40	0.23
30-34	0.57	0.46	0.35	0.39	0.32	0.22
35-39	0.55	0.43	0.35	0.40	0.25	0.19
40-44	0.55	0.43	0.35	0.34	0.21	0.15
45-49	0.53	0.44	0.36	0.27	0.17	0.11
50	0.52	0.46	0.38	0.25	0.16	0.09
51	0.52	0.46	0.38	0.24	0.15	0.09
52	0.52	0.46	0.39	0.23	0.13	0.08
53	0.53	0.46	0.40	0.22	0.13	0.07
54	0.54	0.47	0.41	0.20	0.12	0.06

Table C Loss of earnings to pension age 60: Females – Not disabled

Age at trial	Employed			Non-employed		
	Level 3	Level 2	Level 1	Level 3	Level 2	Level 1
16-19		0.81	0.66		0.78	0.63
20-24	0.88	0.82	0.69	0.86	0.78	0.63
25-29	0.88	0.83	0.72	0.84	0.77	0.64
30-34	0.88	0.84	0.75	0.82	0.77	0.65
35-39	0.88	0.86	0.77	0.81	0.76	0.65
40-44	0.88	0.85	0.79	0.79	0.73	0.62
45-49	0.87	0.84	0.80	0.73	0.65	0.53
50	0.85	0.83	0.80	0.65	0.55	0.44
51	0.84	0.83	0.80	0.62	0.51	0.40
52	0.83	0.83	0.80	0.57	0.46	0.36
53	0.82	0.83	0.81	0.51	0.40	0.32
54	0.82	0.83	0.81	0.45	0.34	0.28

Table D Loss of earnings to pension age 60: Females – Disabled

Age at trial	Employed			Non-employed		
	Level 3	Level 2	Level 1	Level 3	Level 2	Level 1
16-19		0.39	0.22		0.34	0.18
20-24	0.60	0.40	0.22	0.55	0.31	0.16
25-29	0.59	0.42	0.23	0.49	0.31	0.16
30-34	0.59	0.42	0.27	0.44	0.31	0.15
35-39	0.59	0.44	0.31	0.41	0.28	0.14
40-44	0.58	0.48	0.34	0.35	0.24	0.13
45-49	0.58	0.51	0.40	0.26	0.19	0.11
50	0.59	0.54	0.45	0.21	0.15	0.10
51	0.59	0.56	0.47	0.19	0.14	0.09
52	0.60	0.58	0.50	0.18	0.12	0.08
53	0.61	0.61	0.53	0.17	0.11	0.07
54	0.62	0.64	0.57	0.15	0.09	0.06

7. What is visible, immediately and impressionistically, is the scale of the difference that is made by disability status. Of course, the greater the difference between the RF for the “but for” and the RF for the “residual” scenarios, the greater (all other things being equal) the Claimant’s damages. Since in practice this is often simply the difference between the non-disabled and the disabled RF, it is easy to see how this single factor dwarfs the other variables in its ability to alter the award of damages.

The 2007 commentary and its revisions

8. The 8th (2020) edition introduced a number of changes, but for present purposes, the most important is the change in the emphasis given by the commentary to the use of COTM RFs. Compare, for example, the 6th (2007) edition (emphasis added):

*The methodology proposed in paragraphs 33 to 42 **describes one method** for dealing with contingencies other than mortality. If this methodology is followed, **in many cases it will be appropriate to increase or reduce the discount in the tables** to take account of the nature of a particular claimant’s disabilities.*

9. With the equivalent passage from the 8th (2020) edition (again, emphasis added):

*The methodology of applying the Table A to D reduction factors described below **is the suggested method** for dealing with contingencies other than mortality and is applicable in most circumstances. [...] This will **in the majority of cases** enable a more accurate assessment to be made of the mitigation of loss.*

10. Overall, the method is not now suggested; it is prescribed (so far as the authors of the

Tables have that authority).

11. This reflects the long-standing view of Prof Victoria Wass. Prof Wass is both one of the authors of the original research underlying the RFs (which I will return to), and is also now a member of the Ogden Working Party. She has written extensively, since the RFs were first introduced in this form in 2008, about what she considered to be the way that they were misunderstood, and misapplied, by the courts.
12. Prof Wass's particular bugbear, is the tendency in a number of cases beginning with *Conner v Bradman* [2007] EWHC 2789, to alter the RFs. Typically this is done:
 - a. To reflect a finding that, whilst the Claimant might in some technical sense meet the definition of "disabled", there are good reasons to doubt that the loss of earnings resulting from the application of the RFs as suggested in the tables is correct; and therefore,
 - b. To increase, often dramatically, the disabled RF which is applied to the Claimant's expected residual earnings.
13. The typical departure is to the midpoint between the disabled and the non-disabled RF (which was the chosen point in *Conner v Bradman*).
14. The view that has been expressed, trenchantly and repeatedly, is that the definition of disability is inextricably linked with the RFs; and that, so long as that definition is applied correctly, then there is limited space for a departure from those RFs (certainly beyond that envisaged in the associated commentary).

When does the commentary say that a departure may be justified?

15. A large new section of the commentary has been inserted in the 8th edition (from paragraphs 83 to 92), entitled "departures from a strict application". Three cautions are urged:
 - a. First, that the RFs are based on group averages, which are statistically verifiable;
 - b. Second, the average is a central estimate, and it should be expected that there is a distribution either side of that average; and
 - c. Third, that statistically, all results cluster around the average – and therefore, any permitted departures should be modest.

16. Beyond that, and without glossing what is a detailed and extensive treatment of the subject, Prof Wass cautions that departures from the RFs should be rare, and they should be modest. This is, in summary, because:

- a. The effects of being disabled – of meeting the definition – have been measured to have had dramatic effects on employability;
- b. The impact of severity of disability have already been accounted for in the RFs presented for the employed-disabled group, by the (seemingly obvious) exclusion of most of those individuals with the most severe disabilities, which would make work impossible in most circumstances. Thus the level of impairment of those in the employed-disabled group tends towards the moderate and the mild in any event;
- c. The effects of disability on employment prospects go beyond what is considered on an immediate, impressionistic assessment. Thus while a Claimant may remain capable of doing his or her job post-disability, the fact of the disability may impair their ability to move around, or to find alternative employment if they become unemployed, and it is this effect which is accounted for in the diminished RF;
- d. In summary, the statistical analysis of the labour market upon which the RFs were based supports the view that the sorts of modest adjustments between education levels, are the order of adjustments which should be made to account for expected deviations in employability from the disabled RFs.

Jurisprudential status of the tables

17. Section 10 of the Civil Evidence Act 1995 provides that a court will take notice of the Ogden Tables including their explanatory notes (which, in this case, includes this extensive commentary, and also the footnotes where the authors of the Tables make extensive reference to Prof Wass’s academic commentary on the topic). Curiously, that enactment remains un-commenced.

18. The status of the Tables is therefore established not by statute, but by common law. It was in *Wells v Wells* [1999] 1 AC 345, HL in which the House of Lords endorsed the Tables as the “starting point” for the calculation of multipliers, and laid down that the court should be “*slow to depart from the relevant actuarial multiplier on impressionistic grounds*” (379, per Lord Lloyd of Berwick). This is an endorsement, though, of the figures presented in the Tables, and not in and of itself of any commentary which goes with them.

19. This, of course, follows and sits alongside the earlier dicta of the House of Lords in *Mal-*

lett v McMonagle [1970] AC 166, in which Lord Diplock said as follows:

The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

20. The point is almost too trite, but it bears repetition. A future loss is a loss of a chance. The court has to assess the chance. That must mean taking into account and weighing such evidence as is admissible and probative of the scale of that chance. It is not asking what will be, or what would be, so much as what *might have been*, and the probabilities attached to each assessment; an established loss of a 20% chance of gaining £1m is enough, on this authority, to award the Claimant £200,000, even though the inevitable corollary is that the Claimant had a 4/5 chance of getting absolutely nothing.
21. The figures presented in Tables A-D for the RFs are, in their essence, expressions about the probabilities of future events coming to fruition. The source, derivation and basis of the figures presented in the Tables are of obvious relevance to a court faced with a question of whether the figures should be applied as-is, or whether a departure from them is justified; and for that reason, a segue to the central part of the talk – the source, derivation and basis for the RFs – is required at this stage.

The source, derivation and basis of the RFs

22. The underlying research is an article in the Journal of the Royal Statistical Society, *Calculating compensation for loss of future earnings: estimating and using work life expectancy*¹, by Zoltan Butt, Steven Haberman, Richard Verall, and Victoria Wass.

The statistical model

23. The first, theoretical, proposition of the paper is that work-life expectancies (WLEs) – in broad terms, what should be expected, probabilistically, of the outturn of a worker's career and earnings – are path-dependent. That is to say, one's future career depends on the state of one's previous career; and more particularly, one's career at step *N* is dependent on step *N-1*, which in turn is dependent on step *N-2*, and so on.
24. The specific statistical model used is called a Markov chain. This is a so-called "stochastic model", i.e. one that attempts to capture the results of a set of random or unexpected

1 JR Statist Soc A (2008) 171, Part 4, pp763-805

variables. The Markov chain is a form of modelled sequence in which the probability of each event depends on the state attained in the previous event. There are two states in the Markov chain: employed, and not employed; and the probability of being in e.g. the “employed” state in a particular step depends on whether one was employed, or not employed, in the immediately prior step. By adopting such a model as a statistical function, it is possible to obtain an aggregate of the WLE (by integrating).

25. Such theoretical reasoning may be baffling, so a real-world example is helpful. Imagine being given two items: a coin, and a die. You must roll the die, and if you roll any number from 2 to 6, you “win” (say, you gain £1). You do this again and again. But if you roll a 1, you “lose”. You get no reward in that round; and also, in the next round, you have to toss the coin instead. Once you are tossing the coin, a head results in you being permitted to start rolling the die again; whereas a tail means you stay tossing the reward-less coin. If this is done a certain number of times (say, 50 or 100), results will of course vary, but it is possible to calculate an average; and also, the distribution of results of multiple people performing the same sequence should be expected to be bell-curved (i.e. a “normal distribution”, in statistical language).
26. The choice of a Markov model reflects the intuition, and the statistically verifiable reality, that one’s likelihood of being employed at a particular point in time depends on an number of factors, including whether one was employed or not employed immediately before (say, at the same time in the previous year). It is an appropriate model for WLEs, and is used by labour economists in a number of countries. Its crucial function is to provide a framework for identifying those factors which affect employment status, and quantifying their effects.

The data

27. The authors considered longitudinal data (i.e. data gathered from the same subjects over a period of time) from the Labour Force Survey, a large and long-running national employment survey beginning in 1992. In particular, the data are broken down by a number of factors, including sex, age, employment status, education level, and disability status.

Disability

28. Difficulties in assessing disability are expressly identified in the paper. The (then current) definition given by s1(1) of the Disability Discrimination Act 1995 (“DDA1995”) was used, and survey participants were asked to self-report whether they met the definition.
29. Part of the difficulty with this approach is the apparent subjectivity of the definition:

Subject to the provisions of Schedule 1, a person has a disability for the purposes of

this Act...if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

30. Both “substantial” and “normal day-to-day activities” are concepts on which detailed statutory guidance exists to aid interpretation, but which would nevertheless be liable to mislead the lay person. Further, and perhaps more importantly, the result of this analysis may not accord with the subjective self-identity of individuals who may consider the labels “disabled” and “not disabled” to be overlaid with societal meaning which goes beyond mere legislative or statistical categorisation.

31. Nevertheless, there are good reasons to consider that the LFS did not introduce a bias towards over- or under-reporting of disability:

- a. First, the survey did not simply ask participants whether they were disabled. Instead it identified the disabled by self-reports in response to a carefully structured sequence of questions, designed to ensure that participants met the criteria in the then-current statutory guidance which aided the interpretation of s1(1) DDA1995.
- b. Second, the data were verified by comparing the self-reporting proportion of disabled persons in the LFS, with other studies where disability was identified differently (e.g. by asking participants to describe their impairments, and having the survey-taker say whether this amounted to a disability or not). The results in the LFS were sufficiently statistically consistent with the other disability studies to say that disability was not exaggerated in the LFS because of the reporting method.

32. This being the case: within the constraints of the data set examined (which, it must be remembered, are now more than 20 years old), it can be expected that a reasonably good representation of WLEs can be obtained for the population.

Results

33. Analysis of the data allowed the authors to determine the scale of each factor’s effect on WLEs – that is, how much a person’s chances of being employed at point N, was determined by being either employed or not employed, or disabled or not disabled, or a man or a woman, at point N-1. This is where the RFs come from: they are the average for the outturn, for each combination of factors, on a WLE.

34. The findings are illuminating:

- a. First, as the authors put it, *“the most striking feature...is the negative impact of disability on lifetime employment prospects, even for those whose starting state*

is employed. There is an average difference in the RFs between a disabled and a non-disabled man (whose starting state is employed) of about 40 percentage points until the age of 55, after which the differences begin to diminish". The data clearly establish that disability status has a marked determining effect on WLEs, even when the disabled person is in work.

- b. Second, by way of comparison, for non-disabled men aged 20-40, the proportion of their remaining working lives they can expect to remain in remunerative employment is about 90%. On one view this is surprising: few 25 year olds expect to spend four years of their careers before retirement being unemployed. But it reflects the fact that, whilst most will simply continue in employment with few if any interruptions, a small but significant proportion will suffer long and/or persistent absences from the labour market, for a variety of reasons.
- c. The risk to future employment increases, for men, as they get older, between the ages of about 40 and 60. This reflects a number of factors, in particular, the problems faced by middle-aged jobseekers. Thus men who are fortunate enough to have and keep stable work at these ages may well continue to retirement without interruption; but for those who fall out of the labour market for any reason, over the age of 40, it is harder to re-enter employment than it was earlier in one's career. The risk of unemployment persisting is markedly worse, the older the man is when it occurs. This is part of what is known by labour economists as the "scarring effect" of unemployment.
- d. Non-disabled women surveyed had lower figures of engagement with the labour market than equivalent men: this probably reflected the effects of childcare. But unlike men, RFs for women increase with age (i.e. their engagement with the labour market improves).
- e. There is a significant interaction between disability status and education level in determining the WLE, with large differences in WLEs between those disabled workers with higher qualifications and those without (larger than those differences observed between education levels for non-disabled people). But these effects are considerably smaller than the overall difference between the disabled and the non-disabled employed populations.

35. In this last connection, the authors observe that higher education in particular appears to compensate for many of the employment disadvantages suffered by the disabled. This insight is now returned to in the explanatory notes to Ogden 8, at ¶¶83-92, where departures from a strict application of Tables A-D are discussed. It is based on this finding that the Ogden advisory committee (which, in practice, means Prof Wass) advises "using the reduction factors for different employment or educational categories as a guide to the size of the departure, rather than the difference between disability categories" – i.e. taking the most favourable statistics observed for a set of employed but

disabled people.

36. The data presented by the authors gives both the RFs for each sub-category, and the standard error (SE): that is, the standard deviation of the distribution of results around the average (which is the figure given by the RF). Since the results are normally distributed (a “bell curve”), approximately 2/3 of results are within one SE of the mean, and more than 95% of results will be within two SEs of the mean. Thus, taking an employed 36-year-old male as the starting point:
- a. If that male is employed and not-disabled, the RF is 0.904 (i.e. a 90% chance of completing a full career of earnings unimpeded), with a SE of 0.0043. This means that 95% of employed, non-disabled, 36-year-old men will achieve somewhere between 89.5% and 91.3% of full-career earnings.
 - b. If that male is employed and disabled, the RF is 0.448 (i.e. a 45% chance of completing a full career of earnings unimpeded), with a SE of 0.0111. This means that 95% of employed, disabled, 36-year-old men will achieve somewhere between 47% and 42.6% of full-career earnings.

37. Based on the above, it can be seen that the RFs express the average expected WLF that can be expected from each sub-group. It can also be seen, in relation to the analysis of the SEs, that the data support the view that the distribution is “normal” and not especially large.

Disaggregating the RFs: annualised chances

38. The RFs can still be a difficult and somewhat offputting measure. It is important not to lose sight of how they are calculated, i.e. by taking an annual chance of being employed or not employed, and aggregating those probabilities together.
39. Doing the reverse process, and disaggregating the RFs, is an illuminating way of reminding one’s self of how relatively small differences in starting chances can have potentially large effects over the course of a long career. Without completely unpicking the RF methodology presented in the 2008 paper, each RF can be conceived as the result of a simple, compounded series: there is an annual chance of the Claimant losing their employment earnings, and that chance is compounded over a number of years. Thus:
- a. In general terms, the reduction factor (RF) is derived by taking the average annual chance of losing one’s earnings (P), and raising it to the power of the number of years remaining in their career (y): $RF = P^y$.

- b. This being the case, denote $P_{(nd)}$ as the probability of losing earnings when not disabled, and $P_{(d)}$ as the probability of losing earnings when disabled, so that:

i. $RF-A = P_{(nd)}^y$; and

ii. $RF-B = P_{(d)}^y$.

- c. Consider again the case of an employed 36-year-old man, with level 3 qualifications. In the age bracket applicable to a 36-year-old man (35-39), the average number of years remaining to retirement at 65 (the retirement age assumed by the RF table) is 28. For this man, the non-disabled RF (the RF-A, from Table A) is 0.88, and the disabled RF (the RF-B, from Table B) is 0.55.

- d. This being the case:

i. $RF-A = 0.88 = P_{(nd)}^{28}$; and

ii. $RF-B = 0.55 = P_{(d)}^{28}$.

- e. $P_{(nd)}$ and $P_{(d)}$ can then easily be calculated, by taking the 28th root of the RF-A (0.88) and the RF-B (0.55), respectively:

- i. The 28th root of 0.88 is 0.9954 (indicating an annual chance of retaining employment of 99.54% - put another way, an annual chance of losing employment income of 0.46%, or an average chance of a complete loss of income of 1 in 217 each year);

- ii. The 28th root of 0.55 is 0.9789 (indicating an annual chance of retaining employment of 97.89% - put another way, an annual chance of losing employment income of 2.11%, or an average chance of a complete loss of income of 1 in 47 each year).

40. It is this relatively banal insight – that very small probability differences which exist at each stage can compound into relatively large effects when the whole sequence is calculated – which can help non-statisticians to gain an intuitive grasp on what the RFs are, what they mean, and what they describe.

From quantitative, to qualitative: why are the RFs so different for disabled people?

41. This issue has been discussed, primarily by Prof Wass but also by others, in a number of legal and non-legal contexts. “Disability” is an exceptionally wide definition and

encompasses individuals with a wide array of impairments, of varying severities and employment impacts. Some individuals with disabilities are rendered incapable of engagement with the labour market at all, whilst some are able to continue working wholly or largely unaffected.

42. Prof Wass notes, in her 2008 paper for the *Journal of Personal Injury Law*², that there is a higher transition rate from employment to non-employment for the disabled than for the non-disabled. There are a number of common-sensical reasons why this might be:

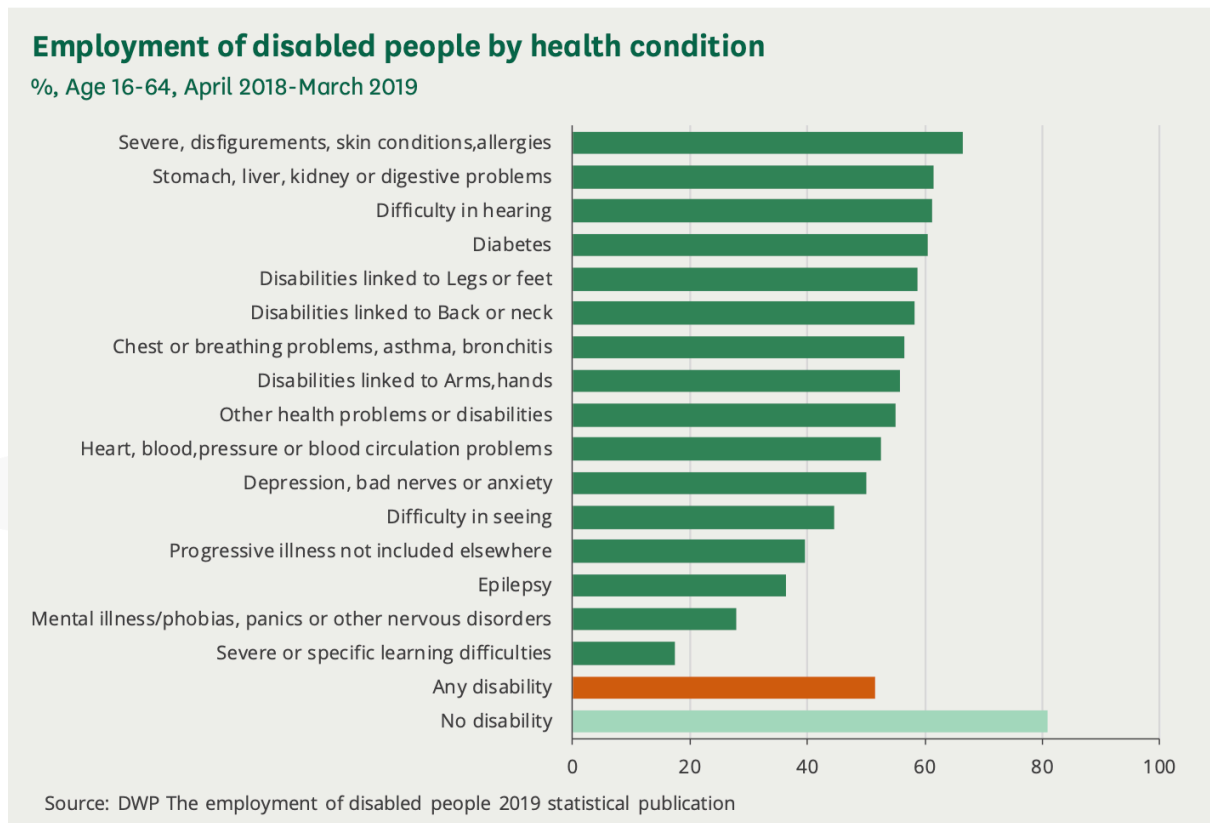
- a. First, and most obviously, the disabled person's disability may push them out of the labour market: either because they reach a breaking point in their ability to balance their symptoms with their work, or e.g. because of discrimination.
- b. But secondly, and less obviously, there are a number of reasons indirectly connected with disability which might cause this effect. A good example is the way that family dynamics play out for disabled persons in work. Of a working couple where one partner is disabled, and the other not, it can be expected on average that the disabled partner would be more likely to give up work e.g. to undertake family caring responsibilities, because the earnings of the non-disabled partner are likely to be more stable and thus more likely to sustain the family.

43. More importantly, what Prof Wass also notes is that this effect – the “drop-out” rate – is dwarfed by the difference in re-entry rates (what might be called the “stay-out” effect). The really big difference between disabled and non-disabled workers, far more so than their probability of losing work, is how likely they are to be able to find remunerative work again. Once again, a careful qualitative assessment of disabled people's employment experiences suggests reasons why this may be:

- a. Disabled people are more likely to rely on an understanding employer, or a particularly strong job-match, to sustain themselves in employment. Once that particular employment relationship is broken (even if for non-disability-related reasons, e.g. through redundancy) they start the hunt for new employment in a profoundly impaired position, compared to the non-disabled.
- b. They are also, often, considerably limited in the proportion of available vacancies which is available to them: of the individuals made redundant from the same job with the same basic skills and characteristics other than disability, the non-disabled jobseekers will be able to apply for jobs (e.g. physically demanding jobs) which are not available to those with certain disabilities.

44. Disabled people's engagement with the labour market varies widely by the type of
2 *Discretion in the application of the new Ogden Six multipliers: the case of*
Conner v Bradman, JPIL 2008, 2, 154-163

disability they have. The following table is taken from a House of Commons briefing paper:



Finally: the wider context

- 45. There is now a large number of cases in which the Ogden RFs have been judicially adjusted, such that this is now a relatively common outcome in cases where a future loss is claimed, and disability is difficult to dispute, but the Claimant appears to have a relatively strong future earnings capacity.
- 46. The first case in this series was *Conner v Bradman*, where the mid-point between the disabled and the non-disabled RF was chosen. This does appear to be the most common choice of adjusted RF.
- 47. Such adjustments need to be put in the context of the implications of the RFs discussed above. Adjustment to a mid-point almost always results in an RF which assumes that the Claimant’s WLE is better than the prospects of a disabled person with considerably higher educational qualifications (and, thus, better job match and labour market attachment). It also, by examination of the SEs, assumes that the Claimant will outperform a large majority of other employed disabled persons: often, it would place them in a position where their WLE would be better than 95% or more of the rest of the comparable cohort.

48. Simply refusing to award an Ogden loss of earnings claim is also an option which is sometimes exercised, per *Billett v Ministry of Defence* [2015] EWCA Civ 773. But there are reasons to criticise *Billett*, for two reasons:

- a. First, the justification for awarding a *Smith v Manchester* award in place of an Ogden award was that the Ogden award would be “*hopelessly unrealistic for the claimant*” (Jackson LJ, [96]). Concerningly, this seems to indicate that the size of the award determined the method of calculation, rather than the other way around.
- b. Secondly, the underlying reason for the unusual situation in *Billett* means it is a difficult case from which to extend a principle. The Claimant had been found to be disabled, “but only just”, and whilst the finding of disability was not appealed, the mode of compensation was in issue before the Court of Appeal. Prof Wass’s view, expressed in JPIL³, was that the initial decision to categorise Mr Billett as “disabled” was wrong: he would not have been considered “disabled” within the meaning of the Ogden Tables, because his impairments did not limit the type of amount of work he was able to do. Thus it was wrong to apply the disabled RFs to him in the first place.

49. Ultimately, there is as much reason to depart from the RFs in the Ogden Tables as there is to depart from the multipliers which make up the main Tables (1-36): in each case the figures presented are averages, which may over- or under-compensate the Claimant. In the case of the multipliers themselves it is generally accepted since *Wells v Wells* that some good evidence has to be presented to demonstrate that the multiplier in the Tables is inapplicable (e.g. because the Claimant can be shown to have an impaired life expectancy). The approach to the RFs at Tables A-D should be no different. The willingness of courts to depart from them, regrettably, appears to reflect a preference for impressionistic reasoning about future careers, which is far more likely to result in under-compensation for claimants.

50. The new guidance notes now incorporate more of the reasoning and insight from the original research that went into the calculation of the RFs. They are no longer simply presented, but there is a degree more explanation, and in particular the implications for departing from a strict application are gone into in considerably greater detail.

51. The new Ogden commentary suggests (¶92) that it may often be necessary to seek expert opinion when a departure from the RF is contemplated. There are obvious benefits in the accuracy which can be achieved from this approach, but it seems to be a rarely-taken course. It is suggested that, in light of the new guidance, this is an avenue that should be explored increasingly in the future.

52. Ultimately, the increased robustness of the RFs benefits both Claimants and Defen-

3 *Billett v Ministry of Defence: a second bite*, Prof Victoria Wass, JPIL 2015, 4, 243-251

dants. Whilst individual Defendants have seen benefits in challenging disabled RFs in the past, the overall effect has been the injection of a large degree of uncertainty in the calculation of damages for career-long losses. This has only led to longer-running litigation, more frequent trials, and increased costs. If the RFs can be accepted in their present form, and only departed from according to the guidance notes (and, where necessary, with the assistance of expert evidence), the settlement of personal injury cases may become considerably easier and less costly.

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